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In The

Supreme Court of the United States

October Term, 1996

PRESBYTERY OF NEW JERSEY OF THE ORTHODOX PRESBYTERIAN CHURCH, a New Jersey corporation; CALVARY ORTHODOX PRESBYTERIAN CHURCH OF WILDWOOD, a New Jersey corporation; REV. DAVID B. CUMMINGS,

Petitioners,

vs.

CHRISTINE TODD WHITMAN, GOVERNOR OF NEW JERSEY, in her official capacity; et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF THE NAMED NEW JERSEY RESPONDENTS

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STATEMENT OF THE CASE

Pursuant to the New Jersey Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-1 *et seq.*, which was originally enacted in 1945, members of legislatively designated classes are afforded civil rights protection, mostly in the areas of employment, housing and access to places of public accommodation. During the more than 50 years since this statute became law, it has been amended to reflect changing public policy by expanding the scope of its protections. By 1991 N.J. Laws 519, the New Jersey Legislature amended the LAD to include "affectional or sexual orientation" among these protected categories.[1] The amendment did not substantively change the LAD; it simply added this category throughout the statute wherever the existing classes are listed. The law was signed by then-Governor James Florio and became effective on January 19, 1992.

In April 1992, the original three plaintiffs – Reverend David B. Cummings, the Presbytery of New Jersey of the Orthodox Presbyterian Church, and Calvary Orthodox Presbyterian Church of Wildwood – brought this action in the United States District Court for New Jersey ostensibly to oppose the amendments, but in fact challenging the constitutionality of particular sections of the law, all of which pertain not only to affectional and sexual orientation but to all protected classes. Specifically the complaint

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[1] "Affectional or sexual orientation" is defined as "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." *N.J.S.A.* 10:5-5hh.

sought declaratory and injunctive relief assuring that religious speech and practices engaged in by plaintiffs would not be subject to punishment pursuant to the law, even if violative of the amended statute. Despite explicit exemptions in the statute for religious institutions and members of the clergy, *See, N.J.S.A.* 10:5-12a, as well as affidavits from the Director of the New Jersey Division on Civil Rights ("Division"), the agency designated to enforce the LAD, indicating that it had never been interpreted as applying to such entities, plaintiffs continued to pursue their challenge.

The present petition seeks review of the third and final decision in this matter from the United States Court of Appeals for the Third Circuit (Pa1-Pa13).[2] Over the course of this arduous litigation, the parties and the issues raised have been significantly refined so that this most recent decision concerns only Reverend Cummings's claims – brought as an individual acting in a secular capacity – regarding only two portions of the LAD: *N.J.S.A.* 10:5-12e (prohibiting any person from aiding, abetting, inciting, compelling or coercing another to engage in an unlawful discriminatory act), and 12n (forbidding the aiding and abetting of a boycott designed to further unlawful discriminatory purposes).[3]

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[2] "Pa" refers to the Appendix to the Petition for a Writ of *Certiorari* filed by Reverend Cummings.

"P" refers to the Petition for Writ of *Certiorari* filed by Cummings.

[3] It was not disputed below that Petitioner had waived his challenge to any other portions of the statute except for those incorporated by reference in these sections (Pa5-Pa6, n.1). As to subsection (j), which requires all persons who activities are

Cummings's first contention, that these sections were unconstitutional on their face, was rejected on all grounds. As to whether they violated the First Amendment's free speech clause, the Third Circuit concluded that the statute had not been shown to be incapable of any constitutional application because of integral "conduct restrictions" therein (Pa7-Pa9). The Court also rejected an overbreadth argument because there had been no showing that protected activities of either Cummings or third parties not before the Court might be drawn within the ambit of the LAD (Pa9-Pa10).

The Court then considered whether to address the next part of Cummings's argument, that the challenged statutory sections were unconstitutional as applied to him. It affirmed the trial court's application of the abstention doctrine pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), agreeing that: (1) New Jersey courts had yet to interpret the questioned provisions of the LAD dispositively; (2) the statutory language was susceptible of constitutionally consistent interpretation by New Jersey courts, and (3) there was a manifest potential for disruption of important state policies by invalidating critical sections of the LAD (Pa11-Pa12). Thus, it should be left to the State courts of New Jersey to interpret the LAD, and Cummings retained the right to

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included within the scope of the LAD to post notices, in a form mandated by regulation, stating the rights of those protected by the law, Cummings's claim was dismissed as unripe because the regulation specifying the form of the poster has never been amended to include mention of sexual orientation; therefore, his argument was simply theoretical (Pa6; Pa33-Pa35).

initiate an action regarding his "as applied" arguments there.

Accordingly, the trial court's decisions that Petitioner had not presented a valid facial challenge to the LAD, and to abstain from reaching his "as applied" attacks, were affirmed (Pa13).

SUMMARY OF ARGUMENT

The writ should be denied because Petitioner has failed to establish that any portion of the New Jersey Law Against Discrimination is unconstitutional on its face or that *Pullman* abstention was inappropriately utilized. The statute is neither facially overbroad nor intrusive as to free speech rights guaranteed by the First Amendment. To the extent that any part of the statute affects speech at all, this is only incidental to its permissible regulation of discriminatory conduct. There has also been no showing that the Third Circuit Court of Appeals erred in abstaining from considering Petitioner's arguments regarding the constitutionality of this statute as applied to him. The Court correctly concluded that no portion of the language of the law had been shown to preclude a reasonable interpretation that would be constitutionally permissible. Given that the New Jersey State courts have not had occasion to construe the particular provisions at issue, the Third Circuit appropriately abstained in accordance with *Pullman*.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE THIRD CIRCUIT'S DECISION AS TO THE FACIAL CONSTITUTIONALITY OF THE NEW JERSEY LAW AGAINST DISCRIMINATION AND THE ISSUE OF *PULLMAN* ABSTENTION WAS ENTIRELY CONSISTENT WITH ESTABLISHED DECISIONAL LAW, AND PETITIONER HAS FAILED TO PUT FORTH A COMPELLING REASON FOR THIS COURT TO REVIEW IT.

In urging this Court to grant the writ of *certiorari*, petitioner iterates arguments repeatedly rejected by the District Court and Third Circuit Court of Appeals that the contested sections of the LAD proscribe the communication of ideas, including ideas based in religious belief, in violation of the First Amendment. However, as the State of New Jersey has consistently maintained, and the courts have agreed, the statute avoids infringing on constitutionally protected speech because it prohibits not the expression of beliefs but discriminatory conduct which consists of more than mere communication.

Petitioner argues first that the challenged parts of the statute are unconstitutionally overbroad on their face. When addressing such a challenge, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (footnote omitted); *City of Houston v. Hill*, 482 U.S. 451, 458 (1987). "Only a statute that is substantially over broad may be invalidated on its face." *Ibid.*; *New York v. Ferber*, 458 U.S. 747, 769 (1982). The overbreadth doctrine has been referred to as "strong medicine" that is

used "sparingly and only as a last resort." *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988), quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Under the circumstances of this case, it must be concluded that the law does not on its face intrude in any way upon constitutionally protected speech.

Petitioner continually misconstrues various provisions of the LAD and ignores the interpretations of the statute historically afforded by the State as well as the numerous court rulings already rendered in this case. Both the District Court Judge and the Third Circuit rejected the argument repeated again here that the LAD "proscribes communicating ideas that are adverse to certain 'sexual orientations' " (P8). On the contrary, subsections 12e and 12n both prohibit all persons from the aiding and abetting of discriminatory acts, not merely the expression of ideas. Section 12e makes it unlawful to "aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." Section 12n contains similar language, making it illegal to "aid, abet, incite, compel, coerce, or induce" the refusal to engage in business transactions with someone based on that person's protected status. Not only is such accomplice liability a valid and essential part of the legislative goal of eradicating discrimination, but these terms, all of which have precise meaning, take the forbidden acts beyond mere speech by requiring accompanying affirmative conduct. "If discriminatory conduct engaged in by 'primary' actors using words can be constitutionally outlawed, . . . so too can discrimination engaged in by third parties who use speech or other expressive conduct to coerce a 'primary' actor to violate an anti-discrimination

statute." *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286, 296 (2d Cir. 1992). Thus, on this issue both courts below agreed that on their face these provisions regulate conduct which the State may legitimately prohibit (Pa9; Pa55).

Aiding and abetting, for example, involves more than just speech, it requires action which assists, supports and supplements the efforts of another in conduct which violates the LAD (Pa59). *See, Baliko v. Stecker*, 275 *N.J.Super.* 182, 191, 645 A.2d 1218 (App. Div. 1994) (aiding and abetting are synonymous with assisting, supporting, etc.).[4] Similarly, the term "incite" is construed consistently with current law to exclude mere expressions of opinion or opposition to the law; again, it requires conduct to be actionable (Pa59).

The type of conduct proscribed by the other terms set forth in *N.J.S.A.* 10:5-12e and 12n is characterized by excessive, threatening force, resulting in the overcoming of another's will. For example, the term "compel" requires not merely advocacy but forceful urging under

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[4] Petitioner challenges the Third Circuit's reference to the *Baliko* decision, saying that the court made an "egregious misstatement" as to the holding in that case. Discussing the uncertainty of New Jersey law on the "aiding and abetting" provisions, the Third Circuit cited *Baliko* for the proposition that courts seem inclined to interpret these terms as they have done in the criminal law context (Pa11). Petitioner faults this reasoning on the ground that *Baliko* was not a criminal case (P16). However, he misconstrues the Third Circuit's point which was that in the civil case before it, the *Baliko* court looked to criminal law – from whence these terms of accomplice liability derive – for guidance on the appropriate way to interpret them.

extreme pressure. The hallmark is the presence of some operative force producing an involuntary response. *U.S. v. Escandar*, 465 F.2d 438, 442 (5th Cir. 1972). "Coercion" involves compelling submission in a vigorous or forcible manner. *Garrity v. State of New Jersey*, 385 U.S. 493, 565 (1967). Finally, *Black's Law Dictionary*, 697 (5 ed. 1979), defines "induce" as causing an act by prevailing upon another. These terms simply cannot be confused with expression of opinion or other non-forcible advocacy.

Nor is there merit to Petitioner's second argument that the statutory sections also impermissibly punish advocacy and prohibit speech on the basis of its content and viewpoint. It should first be noted that the 1992 amendments did not alter the basic provisions of the LAD except to add sexual and affectional orientation as a protected class. While Petitioner implies that these amendments materially changed the statute, the truth is that the provisions now under attack have been in effect for many years, and Petitioner can point to no case whatever, either initiated by the Attorney General or by private parties, in which the LAD has been found to have a chilling effect on constitutionally protected speech.[5] This supports the State's argument that not only is the statute susceptible of a constitutionally permissible interpretation, but it has consistently been so interpreted over the years.

Equally baseless is Petitioner's argument that the law now protects any person wishing to speak out in favor of

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[5] In fact, he provides virtually no evidence that *anyone* has been prosecuted under the challenged sections of the LAD at all.

minority orientation but prohibits those who hold opposite views from expressing themselves (P13). Petitioner can obviously point to no provision in the law which does this because no such distinctions are in fact made. His assertion that the amendments at issue burden his ability to speak against certain sexual orientations fails for two reasons. First, it assumes that only the sexual orientations he opposes, homosexuality and bisexuality, are protected. An examination of the definitional sections of the LAD make clear that *all* sexual orientations are protected, be they heterosexual, bisexual or homosexual. *N.J.S.A.* 10:5-5hh to kk. Hence, the statute makes no distinctions among types of sexual orientation; it prohibits discriminatory conduct aimed at *anyone's* sexual orientation, both majority and minority.[6]

Second, since expression of a "viewpoint," religious or otherwise, is nowhere prohibited, controlled or regulated, Cummings remains free to maintain whatever religious viewpoint he chooses, even if discriminatory. However lively, simple debate does not implicate the LAD. It is only when one discriminates on the basis of a protected status (or aids and abets such discrimination) that the LAD comes into play.

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[6] Contrary to Petitioner's suggestion, "unrepentant homosexual conduct" and "heterosexual sex outside marriage" are not "favored categories under the LAD" (P11). Firstly, nowhere is "adultery" included as a protected category as Petitioner suggests. Secondly, the LAD does not permit, prefer or even address any type of sexual behavior at all. It is concerned only with the orientation or inclination of the protected individual. *See, N.J.S.A.* 10:5-5hh.

Even assuming that the LAD does tangentially infringe on some speech, the interest of the State here is so strong as to justify a minor intrusion into one's discriminatory speech. Neither the State's purpose nor the effect of the LAD is to impose a flat ban on the expression of ideas. What the statute does is target acts of discrimination, and whatever secondary impact this may have on certain kinds of speech is minimal and justified by this compelling state interest. The LAD reflects the Legislature's assessment that discrimination in society is an evil that must be addressed head-on. While First Amendment guarantees are basic rights of all citizens, courts have consistently recognized that these rights can be limited in certain circumstances when fundamental competing interests collide. In weighing these interests, courts are most concerned that the government not regulate the exchange of ideas, especially if the ideology being expressed is offensive to the majority. Clearly, the State's interest in prohibiting discrimination is substantial and compelling. *Ohio Civil Rights Comm'n v. Dayton Schools*, 477 U.S. 619, 628 (1986); *Jews for Jesus, supra*, 968 F.2d at 295. The LAD succeeds in addressing that interest because it does not on its face seek to suppress expression.

In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), this Court held that advocacy alone is entitled to First Amendment protection and that a state may not forbid or proscribe advocacy "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." This is precisely why the LAD contains words of specific meaning – such as "compel" and "incite" – which ensure that

enforcement of the law will not affect the expression of ideas alone. It is only when such words are accompanied by actions that rise to the level of incitement or are otherwise apt to cause unlawful conduct that the LAD applies. As this Court has recognized, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. St. Paul,* 505 U.S. 377, 390 (1992). Similarly, "simply because speech or other expressive conduct can in some circumstances be the vehicle for violating a statute directed at regulating conduct does not render that statute unconstitutional." *Jews for Jesus, supra,* 968 F.2d at 295.

This Court has held that if the government's interest is unrelated to the suppression of free expression, regulation of First Amendment free speech "is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *U.S. v. O'Brien,* 391 U.S. 367, 377 (1968). The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, but such regulation may not burden substantially more speech than is necessary to further the government's legitimate interests. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989).

Petitioner refers the Court's attention to *Hurley v. Irish-American Gay,-Lesbian and Bisexual Group*, ___ U.S. ___, 132 L.Ed.2d 487 (1995) (P6; P14-P15), incorrectly citing it as stating that an anti-discrimination law which is designed to protect homosexuals cannot override the free speech guarantees of the First Amendment (P6). In *Hurley*, the issue was whether Massachusetts' public accommodations law could be used to require the sponsor of a parade to allow members of a protected class to participate over the sponsor's objection. For a violation to occur under Massachusetts law, state action must occur and is triggered when the discriminatory act happens in a place of public accommodation. The Court's holding was that because the parade *did not occur in a place of public accommodation*, the effect of employing the statute there was to declare the sponsors' speech itself to be the public accommodation. *Id.* at 503. Hence in *Hurley*, *this use of the state's power* violated the fundamental rule of protection under the First Amendment: that a speaker has the autonomy to choose the content of his own message. *Ibid.*

The present situation does not involve the same type of state action; here, the State is merely targeting acts of discrimination. Any impact on speech is not direct, but incidental to what is widely recognized as a valid exercise of the state's police power. In fact, the State maintains that *Hurley* actually supports the position that it has always asserted. As the Court held in *Hurley*, "[p]rovisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." 132 L.Ed.2d at 502. Moreover, the Court said that

the Massachusetts statute was constitutionally sound on its face, "ensur[ing] for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public . . . , that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference." *Id.* at 506. It was only when the law *was applied* to expressive activity that constitutional complications arose, *Id.* at 507; however, this offers no support to Petitioner in this case where the lower courts decided only his facial challenge, abstaining from deciding the "as applied" issues.

With respect to the issue of content-based distinctions within laws, in *R.A.V. v. St. Paul, supra,* this Court considered whether a municipal ordinance prohibiting bias-motivated disorderly conduct was constitutional. The majority of the Court found that the municipal ordinance was facially invalid under the First Amendment which prevents government from proscribing speech because of the disapproval of the ideas expressed. While affirming that certain categories of speech can be regulated consistently with the First Amendment, the majority held that government may not regulate those areas based on hostility, or favoritism, towards the nonproscribable message they contain.

Justice Scalia, writing for the plurality of the Court in *R.A.V.*, found the ordinance not only content-based but also viewpoint-based and under-inclusive. However, he noted three exceptions to the prohibition against content discrimination in the area of proscribable speech, including when a sub-class of proscribable speech happens to be associated with particular "secondary effects" of the

speech so that the regulation is justified without reference to the content of the speech. *R.A.V.*, 505 U.S. at 389.

As further explication of this "secondary effect" – and specifically relevant herein – Justice Scalia wrote that

> [a]nother valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "justified without reference to the content of the . . . speech" [citations omitted]. A State could, for example, permit all obscene live performances except those involving minors. *Moreover, since words can in some circumstances violate laws not directed against speech but against conduct* (a law against treason, for example is violated by telling the enemy the nations defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. [citations omitted]. Thus, for example, sexually derogatory "fighting words" among other words, may produce a violation of Title VII's general prohibition against sexual discrimination and employment practices [citations omitted]. *Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.*" (emphasis added, 505 U.S. at 389-90)

R.A.V., then, does not absolutely prohibit even content-based distinctions in the regulation of speech accompanying permissibly regulated conduct, under certain circumstances. Nevertheless, contrary to Petitioner's misreading

of the LAD, it does not target the expressive content of Petitioner's conduct. Fairly read, the language of the LAD does not support the tortured construction advanced by Petitioner. Instead, the statute seeks to remove discrimination in employment, housing and access to public accommodations, which is universally accepted as a legitimate governmental goal.

The cases following *R.A.V.* made even clearer that it does not preclude regulating the type of conduct addressed by the LAD. For example, in *Wisconsin v. Mitchell*, 508 U.S. 476, 490 (1993), this Court found that a statute increasing the penalty for criminals who select victims based on race, religion, color, disability, sexual orientation or national origin does not violate First Amendment free speech rights. The distinction is that "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (i.e., 'speech' or 'messages'), 505 U.S. at 392, the statute in this case is aimed at conduct unprotected by the First Amendment." 508 U.S. at 487. Similarly, the LAD punishes conduct, not expression, and thus civil prosecution under the statute does not violate the charged party's right to freedom of speech. Those subject to the LAD are permitted to communicate their ill will, hatred or biases without fearing an LAD prosecution; what the statute does do is prohibit them from acting on such sentiments in a discriminatory way. Moreover, that the LAD protects certain categories of individuals against discrimination does not render the statute content- or viewpoint-based. *See, Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 2523-24 (1994).

However, even assuming *arguendo* that the LAD is content-based, this would still not render the statute unconstitutional. If a State's regulation of speech is content-based, then a stricter balancing test is necessary to assure that the government is not suppressing ideas. To survive strict scrutiny, a regulation must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983). Elimination of discrimination is a compelling state interest. In *Board of Directors of International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), this Court held that the California Civil Rights Act requiring Rotary Clubs to admit women does not violate the First Amendment right of association. It said: "Even if the [Act] does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling State interest in eliminating discrimination against women." 481 U.S. at 548.

Once it has been determined that there is a compelling state interest, then a balancing test of weighing that interest against the First Amendment interest must take place. In both *Madsen v. Women's Health Center, supra,* and *Schenck v. Pro-Choice Network of Western New York,* ___ U.S. ___, 1997 WL 65718 (1997), the Court affirmed the constitutionality of injunctive orders establishing "buffer zones" which prohibit protesters from congregating around, and impeding access to, specified areas surrounding health clinics which provide abortion services. In doing so, it first determined that the injunctions were not a prior restraint and were content-neutral. *Madsen, supra,* 512 U.S. at 765; *Schenck, supra,* at p. 8. The next step

was to analyze whether the challenged provisions burden no more speech than necessary to serve a significant government interest. 512 U.S. at 765; *Ibid.* It was determined in both cases that the public interests involved (ensuring public safety and order, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services) were valid and justified appropriately tailored injunctions to secure them. *Id.* at 768; *Id.* at 10.

In the present case it must be concluded that Petitioner has seriously misconstrued the intent and effect of the LAD. It does not impinge on speech alone, and it makes no distinctions based on the preference of any sexual orientation over another. Moreover, the government's interest in eliminating discrimination against those who have been found by the New Jersey Legislature to be in need of protection is compelling. Even when balanced against the possibility that some prohibited conduct may also include speech, it is inescapable that the LAD is a reasonable statute intended to further compelling and legitimate state interests.

Petitioner also argues that *N.J.S.A.* 10:5-12, subsections (l), (m) and (n) operate as content-based discrimination toward certain boycotts. These sections of the LAD involve refusing, or inducing others to refuse, to do business with a person on the basis of his or her protected status, including sexual orientation. A fair reading of the pertinent statutory provisions, especially in conjunction with judicial decisions and the agency's history of enforcement, makes clear that the boycott sections are

appropriately drafted to further a compelling state interest and do not infringe on any constitutional right on the basis of content.

Petitioner relies on *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982), which involved a boycott organized by African-American community leaders targeting white merchants who had not complied with a list of demands for "equality and racial justice." The Supreme Court viewed the boycott as comprised of a variety of activities, including gathering for meetings, speech-making, nonviolent picketing, marching, pamphleteering and encouraging others to join. These, the Court said, are all forms of speech or conduct ordinarily entitled to First and Fourteenth Amendment protection. *Id.* at 907.

Such constitutional protection, however, is not without exceptions and limitations. Because boycotting is comprised of not only speech but conduct as well, the government has a right to regulate it for compelling or substantial purposes, even if such regulation entails an incidental limitation on speech. *United States v. O'Brien*, *supra*, 391 U.S. at 376-77. As discussed above, a state law aimed at conduct which places an incidental burden on speech will be upheld if it is within the state's constitutional power and it furthers an important governmental interest unrelated to the suppression of free expression. *Ibid.*

The *Claiborne* case is distinguishable because the governmental interest being advanced there was *economic* regulation. The *Claiborne* Court held that the government's interest in regulating the economic effects of a boycott did not outweigh the boycotters' right to express

their messages. *Id.* at 913-914. Here, however, the governmental interest is not economic regulation but protection against discrimination. Content-neutral regulation of discriminatory conduct has been recognized to be a valid and compelling governmental function. *See, Wisconsin v. Mitchell, supra,* 124 L.Ed.2d at 446; *R.A.V. v. St. Paul, supra,* 505 U.S. at 389-90; *Ohio Civil Rights Comm'n v. Dayton Schools, supra,* 477 U.S. at 628.

Thus, in *Jews for Jesus, supra,* the Second Circuit held that anti-discrimination statutes could constitutionally be applied to the defendant, a coalition of religious groups, when it threatened to boycott a resort hotel because it had contracted to provide its facilities to plaintiff, a non-profit religious corporation which the defendant organization opposed. The court said that if the boycott was designed to further an unlawful discriminatory objective it would not be protected by the First Amendment. 968 F.2d at 296.

Moreover, Petitioner Cummings would not be using the boycott to "effectuate rights guaranteed by the Constitution itself" as in *Claiborne.* In fact, Petitioner admits that the only reason for such a boycott would be to discriminate on the very *status* of the targeted businessperson that entitles him or her to protection under the LAD in the first place (P14). Importantly, the *Claiborne* Court expressly stated that it was *not* addressing a boycott "designed to secure aims that are themselves prohibited by a valid state law." *Id.* at 915, n. 49. Here, the goal of the boycott – refusing to do business with someone on the basis of his or her sexual orientation – would be prohibited by State law, namely section 12l. It is therefore a vastly different situation than the one before the

Claiborne Court. It must be concluded, then, that the boycott provisions are clearly not violative of the First Amendment on their face.

With respect to another part of the LAD, Petitioner challenges *N.J.S.A.* 10:5-12j, which authorizes the Division to design posters, signs or other notices describing the rights of those protected by the LAD and prohibits those who are subject to the LAD from refusing to display them. Although Petitioner offers no examples of any past enforcement of this statute, he alleges that the law forces some individuals to express ideas with which they disagree by requiring the posting of signs which declare the rights of those protected under the LAD (P14-P15). This part of the complaint was dismissed below for lack of adversity of interests due to the absence of any current statutory or regulatory provision requiring that Petitioner or anyone else post a notice indicating that discrimination on the basis of sexual orientation is prohibited by law (Pa6; Pa33-35); nevertheless, the argument is clearly without merit.

It is true that the Director does, within the scope of his authority, require that certain posters or signs declaring the rights and responsibilities of those who are affected by the LAD be displayed by those who are subject to the law. Such signs are described and mandated by regulation in *N.J.A.C.* 13:8-1.1 *et seq.* In fact, under *N.J.S.A.* 10:5-12j one who fails to display such sign as required is subject to prosecution under the LAD. However, the Division has repeatedly emphasized throughout this litigation that the Director will not authorize the amendment of the relevant posters to include sexual orientation until the questions raised in this action have

been resolved. Therefore, the posters currently in circulation do not mention sexual orientation as a category of protection.[7] Moreover, should the regulations ultimately be amended, they will do no more than require those who are subject to this provision of the LAD to display notices which accurately state the current status of the protections to which all are entitled under the law.

Having concluded that the Petitioner had not demonstrated facial unconstitutionality, the lower courts both agreed to abstain from reaching the merits of his arguments regarding the statute "as applied" to him. In his challenge to this decision, he continues to maintain that the statute is facially invalid and not amenable to any state court interpretation that could rescue it. Rejecting Petitioner's argument, both courts carefully considered the fact that these provisions are largely untested by New Jersey courts, which, they reasoned, must be given the opportunity to consider whether they are susceptible of a constitutional interpretation.

It is well settled that federal courts are duty-bound to avoid reaching constitutional issues if there are other grounds that can resolve the matter. *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). It is further

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[7] Petitioner has made much of the fact that a small number of signs which included sexual orientation were inadvertently distributed by the Division's staff to persons who requested them (Pa161). The agency has repeatedly made clear, however, that this was an unauthorized action and that steps have been taken to ensure that no additional such posters were distributed until properly authorized. Thus, currently no person can be compelled to post any sign which describes sexual or affectional orientation as a category of protection.

settled that where the issues raised involve state law, "constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy." *Railroad Commission of Texas v. Pullman Co.*, 312 U.S., *supra*, at 498.

When the issues revolve around the appropriate construction of a state law, deference is given to the state courts. "Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. The construction given to a state statute by the state courts is binding upon federal courts." *Albertson v. Millard*, 345 U.S. 242, 244-45 (1953). Thus, this Court has come to recognize "a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the independence of the state governments' and for the smooth working of the federal judiciary." *Pullman, supra*, 312 U.S. at 501 (citations omitted). "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system." *Harrison v. National Association for the Advancement of Colored People*, 360 U.S. 167, 176 (1959). "In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Ibid.*

Generally, *Pullman* abstention is appropriate whenever "there is an unsettled question of state law, the resolution of which would affect the decision of a federal constitutional issue, either by obviating the need to decide it or by changing the light in which it must be viewed." *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743, 746 (3d Cir. 1982), *cert. den.* 456 U.S. 990 (1982). Following the generally recognized prerequisites for *Pullman* abstention, the lower courts considered: that New Jersey law is uncertain as to the challenged aiding and abetting provisions as applied to religiously or politically motivated speech; that a state court decision could narrow, or obviate, the federal constitutional issues presented, and that there are important state interests at stake (Pa11-Pa13; Pa43). *See, Hughes v. Lipscher*, 906 F.2d 961, 964 (3d Cir. 1990).

A similar situation to this one was presented in *Albertson v. Millard, supra*, in which a Michigan statute requiring official registration of Communist organizations and their members was challenged as being unconstitutionally void for vagueness. This Court, noting the importance of state judicial interpretation of state laws, said that there had been no opportunity for such construction because the federal action had been commenced only five days after the statute became law. The Court said: "We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action." 345 U.S. at 244-45.

Thus, the State of New Jersey, through its administrative agency and the State judiciary, must first have the opportunity to examine these provisions because of the

likelihood that they will be construed in a manner consistent with all appropriate constitutional mandates. This Court has repeatedly held that "abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.' (citations omitted)." *Bellotti v. Baird*, 428 U.S. 132, 146-147 (1976). Moreover, abstention is not rendered inappropriate simply because First Amendment issues are raised. Especially when an important state interest – such as the elimination of discrimination – is presented, and the state forum offers an adequate opportunity to adjudicate constitutional questions, abstention will not be avoided by the assertion of First Amendment rights. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., supra*, 477 U.S. at 628.

It must also be emphasized that the LAD has consistently been construed to avoid even the possibility of an unconstitutional application, particularly respecting legitimate belief and free exercise protected by the First Amendment. In fact, in the affidavits submitted early in this litigation by the Division's Director, the agency clearly expressed its intention not to apply the LAD in any manner which, liberally construed, would even tend or threaten to violate the sincere tenets of any religion. The Division will also not engage in any determination of what constitutes a tenet of religious faith.

Thus, the Division's past practices and expressly stated intentions make clear that all First Amendment limitations on the application of the LAD have been, and

will be, respected and that no facial constitutional infirmity has been shown. It must therefore be considered likely that a similar construction will be afforded to the amended statute by New Jersey courts.

Accordingly, the lower courts were well within the scope of their discretion in concluding that the correct course of action is to abstain from deciding the constitutional questions raised by Petitioner because state judicial interpretation of the statutory provisions being challenged is likely to obviate the need for further action by our federal courts.

CONCLUSION

For the foregoing reasons, the State of New Jersey Respondents respectfully request that the Petition for a Writ of *Certiorari* be denied.

Respectfully submitted,

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